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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ALBERT METZGER, JR.,

Defendant and Appellant.

F064012

(Super. Ct. Nos. MCR037304,
MCR036045, MCR038291,
SCR009931, SCR011716)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

Thomas Albert Metzger, Jr., pled guilty to various offenses, was sentenced to state prison for an aggregate term of five years, execution of sentence was suspended, and he was placed on formal probation, which included local jail time. After he violated probation, the previous suspended sentence was imposed. On appeal he contends only that the trial court failed to find that he had the ability to pay a \$73 per day confinement fee. We find that the issue has not been preserved for appeal. Accordingly, we affirm the judgment.

PROCEDURAL HISTORY

The facts of Metzger's various offenses are not at issue and will not be repeated here. The procedural history of his case is as follows: On April 22, 2010, three separate informations were filed, charging Metzger with various crimes and enhancements. (Case Nos. MCR036045, SCR009931 and MCR037304, hereafter Case Nos. 1, 2 and 3). On May 7, 2010, Metzger entered a not guilty plea to all charges and all prior conviction and enhancement allegations.

On June 9, 2010, the probation department filed a pre-plea report and recommendation in which it noted that Metzger had said that he previously worked as a cement finisher and that his family owned a construction and concrete business that would employ him "anytime he needs work."

On July 7, 2010, an information was filed in another case (Case No. MCR038291, hereafter Case No. 4), charging Metzger with additional crimes. On July 23, 2010, the probation department filed another report in which it recommended that the trial court impose various fees, "but not conditions of probation," (full capitalization omitted) including, inter alia, a "\$73 fee per day for the cost of Court ordered confinement ... [pursuant to section] 1203.1c" and a "\$36 per month supervision fee." A supplemental report and recommendation filed by the probation department on August 6, 2010, recommended the same fees.

On August 12, 2010, Metzger entered guilty pleas to various counts in Case Nos. 1, 2, 3 and 4, with the remainder of the counts dismissed. Prior to sentencing, the trial court asked both parties if they had “any corrections or additions to be made” to the probation officer’s report. Metzger’s counsel did not object to any of the information in the report. The court then sentenced Metzger to state prison for an aggregate term of five years, execution of sentence suspended, and Metzger placed on formal probation for a period of five years. He was ordered confined to county jail for 184 days. The trial court then imposed numerous fines and assessments, after which the trial court stated, “Defendant is to report to the County Revenue Officer to determine ability to pay.” The trial court then stated, “[T]he following fees are imposed but not conditions of probation: A \$73 fee per day for the cost of court-ordered confinement including presentence confinement in the county jail pursuant to [section] 1203.1(c) of the Penal Code. A \$36 per month supervision fee....” Metzger accepted the terms and conditions of probation.

On June 9, 2011, a criminal complaint was filed (Case No. SCR011716, hereafter Case No. 5), alleging additional counts and further allegations of prior convictions. On June 21, 2011, the probation department filed a petition seeking to revoke Metzger’s probation based on the allegations in Case No. 5. Metzger subsequently entered a plea of not guilty to the charges in Case No. 5 and denied the enhancement allegations.

On July 8, 2011, following a preliminary hearing in Case No. 5, the trial court determined that Metzger was in violation of his probation in Case Nos. 1, 2, 3 and 4. On July 13, 2011, after an information was filed in Case No. 5, Metzger entered a plea of not guilty and denied the enhancement allegations. These charges were later dismissed on the People’s motion.

On October 3, 2011, prior to executing the previously imposed sentence, the trial court noted that it had read and considered the September 20, 2011, probation report. That report incorporated the previous reports, discussed ante, and again noted the imposition of the \$73 per day fee. Without objection, the trial court imposed, inter alia,

“a \$73 fee per day for the court-ordered confinement, including pre sentence confinement, in the county jail pursuant to Penal Code Section 1203.1(c).”¹

DISCUSSION

On appeal, Metzger challenges imposition of the \$73 fee per day of court ordered confinement, including time spent in county jail, pursuant to section 1203.1c² and the \$36 per month supervision fee pursuant to section 1203.1b,³ claiming that the fees were imposed without making the required findings of his ability to pay.⁴ The People argue

¹ All further statutory references are to the Penal Code unless noted otherwise.

² Section 1203.1c, subdivision (a) provides:

“In any case in which a defendant is convicted of an offense and is ordered to serve a period of confinement in a county jail, city jail, or other local detention facility as a term of probation or a conditional sentence, the court may, after a hearing, make a determination of the ability of the defendant to pay all or a portion of the reasonable costs of such incarceration, including incarceration pending disposition of the case.... If the court determines that the defendant has the ability to pay all or a part of the costs, the court may set the amount to be reimbursed and order the defendant to pay that sum to the county, or to the city with respect to incarceration in the city jail, in the manner in which the court believes reasonable and compatible with the defendant’s financial ability....”

³ Despite Metzger’s assertion that the October 3, 2011, court reimposed the \$36 per month supervision fee, we find no evidence of that in the record and will not address it here. Even if we were to address the probation fee, it would not alter our analysis.

⁴ In his opening brief, filed March 21, 2012, Metzger contends that the trial court erred when it increased the security fees from \$30 per count to \$40 per count at the time it revoked his probation. Earlier, on February 7, 2012, Metzger filed an informal letter request with the superior court, pursuant to *People v. Fares* (1993) 16 Cal.App.4th 954, claiming that the increase in security fees at the time of sentencing following revocation of probation was unauthorized. In an order dated April 16, 2012, the superior court agreed and corrected the judgment. Metzger withdrew this contention in his reply brief.

Metzger also filed a second *Fares* letter dated February 16, 2012, asking that the superior court clarify the order that he pay \$73 per day pursuant to section 1203.1c. According to the *Fares* letter, he received collection notices from the County [fn. cont.]

that Metzger forfeited this issue by failing to object in the trial court. Anticipating forfeiture, Metzger asserts that the lack of objection constituted ineffective assistance of legal counsel. We reject Metzger's arguments.

Forfeiture

Following his guilty plea, Metzger was immediately sentenced. When the trial court imposed, inter alia, the \$73 per day confinement fee, there was no objection by Metzger. The People argue that Metzger forfeited any objection to the confinement fee by failing to object in the lower court, citing *People v. Scott* (1994) 9 Cal.4th 331, 353, footnote 15, *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1075-1076 (court, relying on *People v. Scott*, held that defendant's failure to object to fees imposed under section 1203.1b waived the error on appeal), and *People v. Butler* (2003) 31 Cal.4th 1119, 1130 (conc. opn. of Baxter, J.).

Metzger argues that he can raise the issue on appeal for the first time, as the determination of confinement fees presents an insufficient evidence claim that cannot be forfeited, citing to *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397-1401 (*Pacheco*.)

We note that there is a current split in the courts as to whether the failure to object to an imposed fee based on the trial court's failure to make a determination of an ability

of Madera indicating that the county was trying to collect the \$73 per day time he spent in either a rehabilitation facility and/or spent in county jail after his probation was revoked, and section 1203.1c, subdivision (a) "makes it clear the fee can only be assessed for time spent in county jail as a condition of probation. It cannot be imposed for time spent in a rehabilitation facility or time spent in custody once probation has been summarily revoked." Noting that Madera County indicated Metzger owed "nearly \$22,000," he asked that the superior court correct the order to "clarify this point" and to "reflect the total amount" at \$13,432, based on 184 days at \$73 per day. The April 16, 2012, superior court order declined to do so, stating that there was no error on the part of the trial court to be corrected as to the amount of the charge pursuant to section 1203.1c.

to pay forfeits the issue on appeal.⁵ (Compare, e.g., *Pacheco*, *supra*, 187 Cal.App.4th 1392 and *People v. Valtakis*, *supra*, 105 Cal.App.4th 1066.) To the extent that Metzger relies on the reasoning of *Pacheco* to assert his claim was not waived, we conclude that we cannot agree with the reasoning of *Pacheco* and the cases it relied upon.

In *Pacheco*, the Sixth District concluded defendant's claims that the court improperly imposed certain fees and fines were cognizable as claims based on the insufficiency of the evidence to support the order, notwithstanding the defendant's failure to object at sentencing to the fees. In doing so, the court relied on two cases: *People v. Viray* (2005) 134 Cal.App.4th 1186, and *People v. Lopez* (2005) 129 Cal.App.4th 1508. The *Pacheco* court's explanation as to the applicability of the logic and reasoning of *Viray* and *Lopez* – two cases involving imposition of attorney's fees and raising due process concerns – to the imposition of administrative fees shed little light on the analysis it undertook: "[T]hese claims are based on the insufficiency of the evidence to support the order or judgment. We have already held that such claims do not require assertion in the court below to be preserved on appeal. [Citations to *Viray* and *Lopez*.]" (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1397.)

In *People v. McMahan* (1992) 3 Cal.App.4th 740, we addressed a similar situation where we found the defendant forfeited his claim on appeal of imposition of a fine arguably requiring the trial court to first determine defendant's ability to pay prior to imposition. In *McMahan*, the trial court imposed a fine under section 290.3 (at the time, a \$100 fee for defendant convicted of specific sex offenses), which mandates imposition of a fine, "unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3, subd. (a).) We concluded, "even if the court were required to

⁵ A similar issue is under review by our Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee forfeited a sufficiency of the evidence of ability to pay claim on appeal].)

initially determine the defendant's ability to pay, his failure to object or present contrary evidence waived the right to complain on appeal. [Citation.]" (*McMahan, supra*, 3 Cal.App.4th at p. 750.) In reaching our conclusion, we noted, "the most knowledgeable person regarding the defendant's ability to pay would be the defendant himself. It should be incumbent upon the defendant to affirmatively argue against application of the fine and demonstrate why it should not be imposed." (*Id.* at pp. 749-750.) Metzger has provided no reason why we should not follow our reasoning of *McMahan*. We thus conclude Metzger's claim as to the imposition of the confinement fee is deemed forfeited.

Claim of Ineffective Assistance of Counsel

Anticipating our conclusion that he waived the issue for failure to object in the trial court, Metzger asserts he received ineffective assistance of counsel because his attorney failed to object based on inability to pay. We reject this contention.

To establish ineffective assistance of counsel, defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

Metzger cannot meet his burden because the record is silent as to why his trial counsel did not object and, based upon facts outside and in the record on appeal, counsel may have been aware that Metzger did have the ability to pay. In *People v. Mendoza Tello* (1997) 15 Cal.4th 264, the California Supreme Court held that a claim of ineffective assistance of counsel must be rejected if "“the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation”" (*Id.* at p. 266.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*Id.* at pp. 266-267.) On this record, Metzger's claim of ineffective assistance of counsel cannot be established.

DISPOSITION

The judgment is affirmed.